the accused to the Supreme Court. Apparently this section is only applicable to the rare cases in which previous convictions can be proved as part of the evidence for the prosecution. In other cases the magistrate would not know that the accused was a habitual offender until the trial had been concluded.

Section 178 (m) (iii) is the only section which provides for transfer to the District Court for sentence, and such transfer can be made "if it is found that the accused is liable to police supervision." It is of course arguable that the meaning of the section is simply that the case is to be transferred in order that the Court may have jurisdiction to order such supervision. On the other hand this is not what the section says —the section provides that the case be transferred for sentence and *prima facie* that means any sentence which the District Court has jurisdiction to impose. Although it is unfortunate that the section is so obscurely worded, I have come to the conclusion that the words "if it be found that the accused is a person liable to police supervision" simply means "if he is a person convicted of an offence punishable with imprisonment for two years when there has been a previous conviction for an offence similarly punishable."

It is a general principle of the Criminal Law that a heavier sentence can be given when there has been a previous conviction (see Archbold 28th Ed. pages 236 and 237 and *Rex* v. *Metcalfe*, 9 Cr. App. R. page 7 at page 9), and I see nothing in Section 178 (m) (iii) to exclude this principle. I think therefore that on the case being transferred the District Court can give such sentence as it could have given if the case had been heard before it.

As I have found that the accused have been charged under Sections 417 and 116 instead of Sections 420, 511 and 109, the maximum sentence which could have been passed was 3 months R.I. and such sentence cannot be enchanced on transfer to the District Court as the provisions of Section 12(4) are not applicable.

Notwithstanding the grave irregularity of the proceedings I think that the accused was guilty under Sections 417 and 116 and that there has been no failure of justice within the meaning of Section 428 of the Criminal Procedure Code. I would, therefore, uphold the conviction but quash the sentence and substitute a sentence of three months R.I.

Conviction upheld. Sentence reduced.

NOTE:—A practical difference between sections 417 and 420 is that in cases under this former the police cannot arrest without warrant which in cases under the latter they may arrest without warrant.

PENANG.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE PETITION OF THE STRAITS STEAMSHIP COMPANY, LIMITED. Plaintiffs.

and

THE ATTORNEY-GENERAL Defendant,

[PENANG CROWN SUIT No. 1 of 1932]

Shipping and Navigation—Neglect of Statutory Duty—express authority by Government—resulting loss to Steamship Co.—claim for compensation—Crown Suits—tort.

Where an Ordinance imposes a duty with the object of improving the professional status of certificated officers in the British Merchant Service a Company who, by reason of another's neglect of statutory duty, suffers a loss arising out of a mischief not contemplated by the Ordinance, is not entitled to maintain an action in respect of such loss.

Since 1927 the Colonial Government had exempted six small motor vessels plying between the Burmese ports and Penang from the operation of Section 14 of Ordinance No. 125 (Merchant Shipping) which requires vessels to be properly provided with officers duly certificated according to law and in February 1932 issued instructions to the Port Officer of Penang not to prosecute the owners or masters of the offending vessels under Sections 14 and 17 of this Ordinance nor to use his discretion in that behalf. The petitioners, a Steamship Company owning ships which had traded between Penang and Mergui and which were manned with a complement of duly certificated officers, alleged that in consequence of such exemption, the motor vessels were a danger to navigation and the owners thereof were able to run them at an exceptionally low cost and to compete unfairly with their own ships. They further alleged that they had suffered damage,

Held, that the petitioners could not recover, the object of the Ordinance being to ameliorate the condition of masters, mates and seamen and to maintain discipline in the British Merchant Service and not as a precaution against the loss of trade.

MOTION to shew cause why the Petition of Right filed by the Straits Steamship Co., Ltd., against the Attorney-General claiming compensation from the Government of the Straits Settlements in the sum of $154,392.59 should not be rejected.

The facts and arguments are related in the Judgment below.

Hume, (*Rees Williams* with him) for the Plaintiffs.

The Honourable Mr. J. V. G. Mills, Acting Attorney-General (*Bassett* with him), for the Defendant.

Cur. Ad. Vult.

1—11—1932.

PRICHARD, J.—This was a motion to shew cause why a Petition of Right filed by the Straits Steamship Co., Ltd. against the Attorney General claiming $154,392.59 compensation from the Government of the Straits Settlements should not be dismissed as being bad in Law and substance, and disclosing no cause of action.

According to the Petition of Right (the facts in which, for the purposes of this motion, were admitted) the Government of this Colony in 1927 exempted six small motor vessels registered in Burma and trading between Burmese ports and Penang from complying with the provisions of section 14 of Ordinance No. 125 (Merchant Shipping), which requires vessels to carry a proper complement of officers duly certificated in accordance with the law. The Government also instructed the Port Officer not to prosecute the offending Owners or Masters of the motor vessels (as he could have done under sections 14 and 17 of the Ordinance) and not to exercise his discretion in that behalf.

As a consequence of this exemption the motor vessels, it is alleged, were a danger to navigation and the owners were able to run them at an exceptionally small cost and to compete unfairly with the Petitioners' vessels. They were able to obtain freight which should have gone to the Petitioners, and the Petitioners were compelled to reduce their rates.

The Petitioners claimed that the exemption was illegal and stated that, owing to this illegality and the neglect of the Port Officer to prosecute, they had suffered damage.

Mr. Mills, the Acting Attorney-General, agreed that the Ordinance did not authorize the Government to grant an exemption. It was admitted that the act was not authorized by law but his submission was that it was void and of no effect; but he denied it was illegal. He submitted it was not illegal because no agent of the Crown could bind the Crown to exercise its discretion in any particular way in the future. No authority was required for that. So, even if the Crown had made a promise, it could break that promise at any moment.

The acting Attorney-General submitted that this so-called exemption was merely an expression of its intention that the Port Officer should not prosecute. The Port Officer was not bound to prosecute. It was no offence to express an intention that the Port Officer should not prosecute. That expression by the Government was not illegal at all. It was analogous to a non-seizable offence where the Police were not bound to prosecute, but could tell the complainant to lay an information before the Magistrate.

The position was this: these motor junks traded between India and Penang and such trading caused loss to the Company. To go further back, it was the omission of the Port Officer to prosecute that caused the losses; and going still further back, it was due to the instruction from the Government to the Port Officer. Assuming in this respect that the Government must be identified with the Port Officer, the Petitioners still sought to make the Government liable for the junk owners and also responsible for the trading of the junks.

In order to make a third person liable for the acts of a second person he submitted it was necessary that the Straits Steamship Company should bring itself within the provisions of the law as laid down in Clerk and Lindsell on Torts. 8th edition at page 19. Mr. Mills said he relied on the law as laid down there. It is as follows:

> 'Not only is one who procures a third person to commit a breach of an existing contract with the plaintiff liable to an action therefor, but so also is one who procures a third person to abstain from entering into future contracts or to terminate existing contracts with the plaintiff, if the procurement be brought by illegal means. "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (1853) 2 E. & B. 216 the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party" (*Allen* v. *Flood* (1898) A.C. 1 per Lord Watson at page 96). Apart from the use of illegal means or the existence of a conspiracy it would appear that such inducement is not actionable.'

Further, the acting Attorney-General argued that the present case was governed by the principle that was applied in *Gorris* v. *Scott* (L.R. 9 Ex. 125) of which the headnote is as follows:—

> "When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.
>
> "The defendant, a shipowner, undertook to carry the plaintiff's sheep from a

foreign port to England. On the voyage some of the sheep were washed overboard by reason the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act (1869), s. 75:—

"Held, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiffs could not recover." *Ward* v. *Hobbs*—4 App. Cas. 13, was a similar case.

He submitted an action would not lie because the statute was not intended to apply to the kind of damage which had been caused. The Merchant Shipping Ordinance, as a whole, should be examined to see if there was any right of action.

Mr. Hume, for the Company, in answer to Mr. Mills's first contention argued (correctly, in my opinion) that the law as laid down by Lord Watson and cases like *Allen* v. *Flood* and *Lumley* v. Gye did not apply to our case, where there was no question of contractual relations, this Petition of Right being a claim in tort. In this Colony the Crown is liable in tort, *Attorney-General* v. *Wemyss*, 13 App. Case 192 at page 197. In England the Crown is not liable. Mr. Hume submitted that to authorize a wrong was to do a wrong. The Government authorized the Owner of the motor vessels to violate the provisions of the Merchant Shipping Ordinance. In England the King cannot authorize a wrong—*Feather* v. *Regina*—14 Rev. Rep. 413, 414.

Further, Counsel for the petitioners submitted that cases like *Gorris* v. *Scott* and *Ward* v. *Hobbs*, were founded on contract, they were cases of non-feasance, ours was a case of misfeasance.

I am of opinion that the principle laid down in *Gorris* v. *Scott* and similar cases is a fatal objection to the Petitioners' claim. The harm they have suffered was not the particular sort of mischief which the Ordinance was intended to prevent.

When we examine section 14 of Ordinance No. 125 (Merchant Shipping) we find it is a re-enactment of section 15 of Ordinance 32 of 1910, which is taken from section 13 of the Indian Act 1 of 1859, a law that was in force in the Straits Settlements. It will be noticed that the penalty of Rupees five hundred has become our penalty of dollars five hundred. This Section of the Indian Act is copied from section 136 of Part III of the Merchant Shipping Act of 1854, which in its turn is based on section 30 of the Mercantile Marine Act of 1850. There for the first time we find that certain officers must "have obtained and possessed valid certificates either of competency or service appropriate to their several stations." When we look at the preamble of this Act we see it runs thus "Whereas it is expedient to make provision for improving the conditions of masters, mates and seamen, and for maintaining discipline in the British Merchant Service. Be it enacted etc.".....

It is quite clear, therefore, that the object, and the sole object, of this provision as regards certificated officers was to improve their conditions, that is, it was meant to improve their professional status. It was not even intended, apparently, as a precaution against the dangers of navigation. The damage which the petitioners are alleged to have suffered was due to loss of trade. If the Petitioners' claim had been based on a loss of professional status the objection raised would not have applied.

Mr. Hume's reply was that *Gorris* v. *Scott* was a case of non-feasance. It is quite true that in his judgment in that case Pollock B. said "I agree that it is essential to remember that this action is founded on a contract between the freighter and the shipowner," but if we look at the judgment of Kelly, the Lord Chief Baron, we find no such distinction. On the contrary, the illustration he gives (on page 128 of the report) which refers to the breach of a railway company of its duty to erect a gate at a level crossing and to keep the gate closed except when the crossing was being actually and properly used, the object of the precaution being to prevent injury through animals or vehicles being upon the line at unseasonable times, is an illustration in tort.

I am satisfied that the principle applies to cases of contract as well as of tort, and accordingly this petition must be dismissed with costs.

I certify for two counsel.

Order accordingly.

Solicitors for the Plaintiffs—*Adams & Allan.*

F. M. S.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE ESTATE AND EFFECTS OF LEONG THONG, DECEASED.

[SELANGOR PROBATE No. 11 of 1930]

Probate and Administration Enactment, 1920—Rescission of order revoking a grant of Probate.

There is no provision in the Probate and Administration Enactment, 1920, empowering the Court to rescind an order revoking a grant of Probate.

G. A. Hereford for the applicant.

Yek Yook Yin, the executrix, in person.

14—10—1932.

MUDIE, J.—This is a motion to rescind an Order of Court made on the 13th day of November